



FLSA2019-10

July 22, 2019

Dear **Name***:

This letter responds to your request for an opinion on whether the time spent in a truck's sleeper berth is compensable hours worked under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You write on behalf of a small, family-owned motor carrier (Carrier) that operates a fleet of ten trucks, licensed by the Department of Transportation to move property in interstate commerce, and which primarily provides over-the-road, long-haul services. You represent that Carrier regularly employs drivers to undertake multi-day trips in interstate commerce. You further represent that during such trips, Carrier's drivers typically spend much of their time not working in the truck's sleeper berth. You provide an example of one such trip—a workweek wherein a particular driver spent 55.84 hours driving, inspecting, cleaning, fueling, and completing paperwork, and 49.96 hours in the sleeper berth, during which time he was permitted to sleep, did not perform any work, and was not on call to perform work. In this example, the driver's sleeper berth time for that week broke down as follows:

Day 1: 2.82 hours
Day 2: 0 hours
Day 3: 4.75 hours
Day 4: 12.08 hours
Day 5: 11.67 hours
Day 6: 11.17 hours
Day 7: 7.47 hours

You ask whether Carrier satisfies its federal minimum wage obligation under the FLSA to this driver by paying the driver at least \$404.84 (55.84 hours worked × the federal minimum wage of \$7.25) for the workweek described above.¹

GENERAL LEGAL PRINCIPLES

An employee is working, and must therefore be compensated, when suffered or permitted to work. *See* 29 U.S.C. § 203(e)(1), (g); 29 C.F.R. § 785.11 (“Work ... [that is] suffered or permitted is work time”). WHD regulations address when certain kinds of activities—such as

¹ Based on your assertion in your letter, we assume that the drivers are exempt from the FLSA's overtime requirements under 29 U.S.C. § 213(b)(1).

waiting, sleeping, and traveling—are considered hours worked and thus compensable. *See* 29 C.F.R. §§ 785.14-.23; 29 C.F.R. §§ 785.33-.41. First, waiting time is on-duty (compensable) if the employee is “engaged to wait,” but off-duty (non-compensable) if the employee is “waiting to be engaged” to work. 29 C.F.R. §§ 785.14–.16; *see Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944).² An employee is “engaged to wait,” or on-duty, when “waiting is an integral part of the job,” which may often be during “unpredictable” periods or periods “usually of short duration” in which the employee’s time “belongs to and is controlled by the employer.” 29 C.F.R. § 785.15. For example, a truck driver is “engaged to wait” if required to wait at a job site for goods to be loaded into the truck. 29 C.F.R. § 785.16(b). Conversely, an employee is “waiting to be engaged” during periods when the facts show he is “completely relieved from duty” and the periods are “long enough to enable him to use the time effectively for his own purposes.” *See* 29 C.F.R. § 785.16(a). For example, 29 C.F.R. § 785.16(b) provides that “if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged.” 29 C.F.R. § 785.16(b).

Second, under certain conditions, sleeping time may be considered compensable time if the employer permits the employee to sleep during an on-duty period when the employee is not busy. *See* 29 C.F.R. §§ 785.20–.21. However, if an employer requires an employee to be on duty for a continuous period of 24 hours or more, the parties may agree—under certain conditions—to set aside 5 to 8 on-duty hours as a non-compensable sleeping period. *See* 29 C.F.R. § 785.22.³ Factors that may suggest an employee is continuously on duty for 24 hours or more, thus invoking 29 C.F.R. § 785.22, include: (1) the employee lacks a regular schedule and is “required to perform work on a helter-skelter basis at any time during the day or night”; or (2) even with a regular schedule, unscheduled periods “are so cut through with frequent work calls that this time is not his or her own.” *See* WHD Field Operations Handbook (FOH) 31b02.

Third, travel time is compensable working time when the employer requires the employee to “perform [work] while traveling[.]” 29 C.F.R. § 785.41. “An employee who drives a truck ... or an employee who is required to ride therein as an assistant or helper, is working while riding,” and therefore this time constitutes compensable hours worked. *Id.* However, 29 C.F.R. § 785.41 provides that employees who drive vehicles or are required to ride therein as an assistant or helper are not “working while riding” when they are “permitted to sleep in adequate facilities

² While off-duty employees typically have the ability to leave the physical workplace, there are certain circumstances—for example, working on hard-to-reach construction locations, isolated dredging barges, and offshore drilling sites—where practical considerations make it necessary for employees to remain temporarily on the employer’s premises and to eat and sleep there during their stay. *See* Field Operations Handbook 31b02(a). Such employees are not continually on duty while they are on the employer’s premises if they have a regular schedule of hours and thereafter are relieved of duties—except for extra work required by the exigencies of the job. *Id.* Instead, “[o]nly the actual working time need be counted as hours worked.” *Id.* WHD considers long-haul truck drivers to be similarly situated. Despite inherent restrictions on their ability to leave the truck due to the nature of the job, drivers generally experience periods of time when they are completely relieved of their duties.

³ The employer and employee may also agree to treat an on-duty meal period as non-compensable if it is a “bona fide” meal period. 29 C.F.R. § 785.22.

furnished by the employer[,]” such as a sleeper berth. 29 C.F.R. § 785.41; WHD FOH 31b09(a). This type of travel—traveling while sleeping in a sleeper berth—is not “[work] while riding,” if drivers and assistants are “completely relieved” from their duties. 29 C.F.R. § 785.16(a); *see* 29 C.F.R. § 785.41; *Petrone v. Werner Enters., Inc.*, No. 8:11-cv-401, 2017 WL 510884, at *7 (D. Neb. 2017) (“[U]nder the plain language of § 785.41, drivers and assistants are off duty when permitted to sleep in adequate facilities, such as a sleeper berth.”). Therefore, it is not the “kind of travel” that constitutes working time. 29 C.F.R. § 785.33; 29 C.F.R. § 785.41.

WHD’s earliest guidance on time spent sleeping in a sleeper berth generally considered this time noncompensable. *See* WHD Opinion Letter FLSA-289 (Jul. 18, 1951) (“[H]ours of work are not considered to include ... sleeping in a sleeping berth ... where such periods are of sufficient length to be used effectively by the employee for the intended purpose, and the employee is actually relieved of all duties and responsibilities”); WHD Release R-1933 (Feb. 15, 1943) (“Truck drivers riding in the trucks’ sleeping berths ... need not be compensated ... for time so spent”).⁴

In subsequent guidance, WHD interpreted 29 C.F.R. § 785.41 in conjunction with §§ 785.15-16 and §§ 785.21-22 to mean that while sleeping time may be excluded from hours worked where “adequate facilities” were furnished, only up to 8 hours of sleeping time may be excluded in a trip 24 hours or longer, and no sleeping time may be excluded for trips under 24 hours. *See, e.g.*, WHD Opinion Letter SCA-118 (June 22, 1979); WHD Opinion Letter SCA-117 (Apr. 26, 1978); WHD Opinion Letter FLSA-213 (Jan. 6, 1964).

WHD has concluded that this interpretation is unnecessarily burdensome for employers and instead adopts a straightforward reading of the plain language of § 785.41, under which the time drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non-working time that is not compensable. WHD regulations draw a clear distinction between on-duty sleeping time, *see* 29 C.F.R. §§ 785.20–22, and non-working time when the employer permits the employee to sleep in adequate facilities. *See* 29 C.F.R. § 785.41. The first (on-duty sleeping time) is compensable because it is on-duty—except under certain circumstances during on-duty periods of 24 hours or more—while the second is non-compensable because it is presumptively off-duty. *See Petrone*, 2017 WL 510884, at *7. This presumption—that non-working time in which the employee is relieved of all duties is not compensable—holds true regardless of whether the truck is moving or stationary. *See Nance v. May Trucking Co.*, 685 F.

⁴ That said, there may be some cases where a driver or assistant who retires to a sleeper berth is unable to “use the time effectively for his own purposes.” 29 C.F.R. § 785.16(a); *see* WHD Opinion Letter FLSA-289. For example, a driver or assistant who is required to remain on call, study job-related materials, or do paperwork in the sleeper berth may be unable to effectively sleep, nap, or engage in other personal activities, like reading or gaming. *See* 29 C.F.R. §§ 785.16–17; WHD Opinion Letter FLSA-289. However, as a general matter, a driver or assistant who retires to a sleeper berth has typically ceased his or her duties. “Accordingly, sleeping berth time is compensable, if ever, only where a plaintiff can demonstrate that he or she was on duty while in the sleeper berth.” *Petrone*, 2017 WL 510884, at *7; *see Nance v. May Trucking Co.*, No. 3:12-cv-01655-HZ, 2014 WL 199136, at *8 (D. Or. Jan. 15, 2014) (finding that an employee in a sleeper berth who is not on call is off-duty “as a matter of law”), *aff’d in relevant part*, 685 F. App’x 602, 605 (9th Cir. 2017) (unpublished).

App'x 602, 605 (9th Cir. 2017) (unpublished) (“[D]rivers are not entitled to compensation for time they are permitted to sleep in the berths of moving trucks.”). Because WHD regulations classify sleeper berth time as non-working travel time, rather than on-duty sleeping time, such time is presumptively off-duty and not compensable.⁵

Further, this position is consistent with the decisions of several courts, which WHD understands to reflect the prevailing practice in the trucking industry. *See Nance*, 2014 WL 199136; *Petrone*, 2017 WL 510884, at *7.⁶ Thus, WHD is withdrawing the opinion letters referenced above and others to the extent that they conflict with this letter.⁷

OPINION

Based on the facts you provided—a representative example of a truck driver who spent 55.84 hours in a workweek driving, inspecting, cleaning, fueling, and completing paperwork, and 49.96 hours off-duty in the sleeper berth—Carrier would indeed satisfy its FLSA minimum wage obligation to this driver by paying the driver at least \$404.84 (55.84 hours worked × the federal minimum wage of \$7.25). The driver’s time spent in the berth was time when the driver was relieved of all duties and was “permitted to sleep in adequate facilities furnished by the employer,” and presumptively non-working, off-duty time.⁸ You have represented that, when the driver was in the berth, he did not perform any work and was not on call to perform work. Accordingly, the driver’s time in the berth was not compensable.

We trust that this letter is responsive to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).**

⁵ To the extent specific factual circumstances support that a driver is on-duty or on-call this presumption may be rebutted. *See, e.g., supra* n.4.

⁶ WHD disagrees with recent judicial decisions that have regarded sleeper berth time as on-duty sleeping time, rather than off-duty travel time. *See, e.g., Julian v. Swift Transp. Co. Inc.*, 360 F. Supp. 3d 932 (D. Ariz. 2018); *Browne v. P.A.M. Transp., Inc.*, No. 5:16-cv-5366, 2018 WL 5118449 (W.D. Ark. 2018).

⁷ *See, e.g.*, WHD Opinion Letter SCA-118 (June 22, 1979); WHD Opinion Letter SCA-117 (Apr. 26, 1978); WHD Opinion Letter FLSA-235 (Nov. 18, 1966); WHD Opinion Letter FLSA-214 (Feb. 17, 1964); WHD Opinion Letter FLSA-213 (Jan. 6, 1964).

⁸ We assume from the facts provided that the drivers in question are neither “required to perform work on a helter-skelter basis,” nor are the periods in the sleeper berth “so cut through with frequent work calls” that the time in the sleeper berth is not the driver’s own. *See* WHD FOH 31b02.